UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

HILDENE OPPORTUNITIES MASTER FUND, LTD.	)	
	)	Case No. 4:14-cv-01110-ODS
Plaintiff,	)	
v.	)	
ARVEST BANK, *et al.*	)	
Defendants.	)	

DEFENDANT ARVEST BANK'S SUGGESTIONS IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO HILDENE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

SQUIRE PATTON BOGGS (US) LLP
Joseph C. Weinstein (admitted *pro hac vice)*
joe.weinstein@squirepb.com
Sean L. McGrane (admitted *pro hac vice*)
sean.mcgrane@squirepb.com
4900 Key Tower, 127 Public Square
Cleveland, OH 44114
Tel: (216) 479-8500
Fax: (216) 479-8780

Attorneys for Defendant Arvest Bank

SHOOK, HARDY & BACON L.L.P.
Michael S. Cargnel
mcargnel@shb.com
Jenna Sheldon-Sherman
jsherman@shb.com
2555 Grand Boulevard
Kansas City, MO 64108
Tel: (816) 474-6550
Fax: (816) 421-5547

Attorneys for Defendant Arvest Bank

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PRELIMINARY STATEMENT

The United States Court of Appeals for the Eighth Circuit has made clear that in cases like this involving purely economic injuries, Missouri courts are to apply the statute of limitations of the jurisdiction in which the plaintiff was located and could ascertain its damages – not the jurisdiction where the underlying wrongful conduct allegedly occurred, as plaintiff Hildene Opportunities Master Fund ("Hildene") incorrectly argues in its motion for summary judgment. *See Great Plains Trust Co. v. Union Pacific R.R. Co.*, 492 F. 3d 986 (8th Cir. 2007). The undisputed factual record here shows that U.S. Bank National Association ("U.S. Bank") – the assignor of Hildene's claim and thus the party against whom Arvest Bank's statute of limitations defense is directed – ascertained its alleged financial damages in Massachusetts. Thus, under *Great Plains*, this Court should apply Massachusetts' three year statute of limitations, which begins to run "when an event or events have occurred that were reasonably likely to put the plaintiff on notice that someone may have caused her injury." *Shay v. Walters*, 702 F.3d 76, 80 (1st Cir. 2012).

Here, the alleged breach of contract that gives rise to U.S. Bank's assigned tortious interference claim against Arvest Bank occurred no later than June 22, 2012, when Arvest Bank completed its purchase of substantially all of the assets and assumption of certain of the liabilities of Union Bank (the "Union Bank Transaction"). The closing of the Union Bank Transaction on June 22, 2012, was "reasonably likely" to put U.S. Bank on notice that it may have been injured; and indeed, on July 16, 2012 – only weeks after the Union Bank Transaction closed – U.S. Bank wrote a letter asserting that the Union Bank Transaction constituted a breach of the underlying contract, making clear that U.S. Bank was in fact on notice by that date. Yet for more than three years, U.S. Bank did nothing. It was only on August 7, 2015, that U.S. Bank purported to assign its claims to Hildene, but by then it was too late. Because the applicable three year statute of limitations governing U.S. Bank's claim expired no later than June 22, 2015, and because Hildene first brought claims as the purported assignee of U.S. Bank on August 7, 2015, plaintiff's claims are time-barred, and summary judgment should be granted for Arvest Bank.[1]

CONCISE STATEMENT OF UNCONTROVERTED MATERIAL FACTS IN SUPPORT OF ARVEST BANK'S CROSS-MOTION FOR SUMMARY JUDGMENT

The facts below are the uncontroverted material facts in support of Arvest Bank's cross-motion for summary judgment on statute of limitations grounds. In its motion for partial summary judgment, Hildene includes its own statement of material facts – many of which are either directed toward its claim against Defendant Bannister Bancshares, Inc. ("Bannister") or are otherwise irrelevant to the statute of limitations analysis. Nevertheless, consistent with Local Rule 56.1(a), Arvest Bank is attaching to these suggestions an appendix that states which "facts" identified by Hildene are in dispute.

A. The Union Bank Transaction closed on June 22, 2012, and U.S. Bank declared a breach almost immediately thereafter.

1. Union Bank was a subsidiary of Bannister which, at the time of the Union Bank Transaction, was on the verge of collapse. In early 2012, for example, the Federal Reserve Bank of Kansas City wrote that "Union Bank's condition has deteriorated to the point where its long-term viability is in question. Asset quality problems have resulted in operating losses that have

[1] On August 4, 2016, Hildene filed its "Motion for Partial Summary Judgment as to (1) Count III of the Second Amended Complaint Against Defendant Bannister and (2) Defendants' Statute of Limitations Defenses." ECF No. 114. Although discovery does not close in this case until October 3, 2016, and although summary judgment motions are not due until November 3, 2016, Hildene wrote in its suggestions in support of its motion that "while certain issues raised in this case may require further discovery or deposition testimony," the statute of limitations issue does not. ECF No. 114 at p. 1. Arvest Bank agrees with this statement and is accordingly filing a cross-motion for summary judgment on its statute of limitations defense. However, because discovery is still open and depositions have not yet even begun, Arvest Bank cannot yet move for summary judgment on its other defenses, but intends to do so before the November 3, 2016 deadline.

depleted capital. Union Bank is now considered Significantly Undercapitalized and is in dire need of capital resources." *See* attached Ex. A. The Federal Deposit Insurance Corporation also had assessed a $120 million cross-lien against the assets of Union Bank, in connection with the failure of a sister bank. Ex. B.

2. On or around January 30, 2012, Arvest Bank publicly announced that it would be purchasing substantially all of the assets, and assuming certain of the liabilities, of Union Bank, subject to regulatory approval and other closing conditions. *See* ECF No. 114-6 (Exhibit No. 6 to Hildene's Motion for Partial Summary Judgment).

3. On March 21, 2012, counsel for Bannister – in response to an inquiry from U.S. Bank – wrote to U.S. Bank and stated that Arvest Bank would not be assuming Bannister's obligations under the Debentures (as defined in the following section) and was not required to do so. Ex. C.[2]

4. On June 22, 2012, after the requisite regulatory approvals were obtained and other conditions were satisfied, Arvest Bank and Union Bank closed the Union Bank Transaction. Ex. E at p. 6.

5. Approximately three weeks later, on July 16, 2012, U.S. Bank wrote to Bannister and declared the Union Bank Transaction to be a breach of the Indenture: "[Bannister's] sale of substantially all of the assets of its operating subsidiary, Union Bank, without compliance with Article XI of the Indenture (which we assume to be the case), constitutes a breach of Section 3.7

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[2] The Indenture contract between U.S. Bank and Bannister contains a so-called "successor obligor provision" that prohibits ***Bannister*** from selling substantially all of ***Bannister's*** assets to a third-party, unless the third party assumes Bannister's obligations to pay the interest and principal due under the Debentures. Ex. D at §§ 3.7, 11.1. U.S. Bank's inquiry (and subsequent claim in this case) is based on the (incorrect) premise that the Union Bank Transaction breached the successor obligor provision because Arvest Bank did not assume Bannister's obligations to pay the Debentures. In the Union Bank Transaction, however, Arvest Bank purchased assets and assumed liabilities ***directly from Union Bank***, not from Bannister, and therefore the Union Bank Transaction did not constitute a breach of the successor obligor provision (which applies only to the assets and liabilities of Bannister, not Union Bank – a separate corporate entity).

of the Indenture . . . ." Ex. F; *see also* Ex. G ("Such a covenant breach by the Company constitutes a Default under Section 5.1(c) of the Indenture."). These communications were sent from U.S. Bank's Boston offices.

B. **U.S. Bank was allegedly financially damaged in Massachusetts.**

6. U.S. Bank is the trustee of an indenture contract (the "Indenture") between itself and Bannister Bancshares, Inc. ("Bannister"), dated December 17, 2003. *See* Ex. D. U.S. Bank is also the trustee of a separate trust called the "Bannister Statutory Trust." *See* ECF No. 114-2 (Ex. No. 2 to Hildene's Motion for Partial Summary Judgment).

7. Pursuant to the Indenture, Bannister issued approximately $20 million in debenture securities (the "Debentures"), which entitle their holders to receive from Bannister periodic interest payments and a repayment of the principal at the end of the Debentures' 30-year term. Ex. D at A-1-2; Ex. J.

8. At the time it declared the Indenture to have been breached, U.S. Bank, as trustee, claimed to be the "sole holder of the Debentures." Ex. G.

9. Documents produced by U.S. Bank show that the Debentures were registered to "U.S. Bank NA, as Trustee," at U.S. Bank's offices at One Federal Street in Boston, Massachusetts. *See* Ex. H at USB00269; Exhibit I.

10. The Debenture securities themselves require Bannister to pay the principal and periodic interest payments directly to U.S. Bank, as trustee. Ex. J. at USB00135-37.

11. Documents produced by U.S. Bank show that payments due under the Debentures were to be wired to "US BANK NA BOSTON." Exs. H & I.

12. The U.S. Bank Vice President responsible for the Debentures through June 2012, Paul Allen, was located at the same One Federal Street office in Boston at which the Debentures were registered. Ex. K.

13. The U.S. Bank Vice President responsible for the Debentures since July 2012 (at which point the Bannister account was transferred to U.S. Bank's default unit), James Byrnes, is located at the same One Federal Street office in Boston. Ex. F.

14. U.S. Bank sent regular communications to Bannister regarding the Debentures from its offices in Boston. Exs. K & L.

15. On a quarterly basis, a U.S. Bank trust officer based in Boston calculated the amount of interest owed to U.S. Bank by Bannister, and sent Bannister a breakdown of such amounts, with instructions to wire payments to U.S. Bank. Ex. M.

16. The Indenture also required U.S. Bank to maintain an office in Connecticut where payments could be made.[3]

C. **U.S. Bank purported to assign certain claims to Hildene on August 7, 2015.**

17. Hildene is a hedge fund that purports to have "made a killing investing in beaten-down assets" over the years. (*See* www.hildenecap.com/category/news/, last visited on August 23, 2015.)

18. Hildene does not hold (and has never held) any of the Debentures. Hildene owns only a very small fraction of subordinated notes issued by a downstream collateralized debt obligation ("CDO").[4]

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[3] As explained below, Connecticut's three year statute of limitations is materially identical to Massachusetts' statute and, if applied, also would bar U.S. Bank's (and Hildene's) claim.

[4] New York law governs the purported assignment from U.S. Bank to Hildene, and as this Court has recognized, an assignment is valid under New York's champerty doctrine only if the assignee has a "***significant*** preexisting interest" in the case. ECF No. 78 at 14. This Court deferred ruling on the validity of the purported assignment between U.S. Bank and Hildene until after the close of discovery. To date, discovery has shown that the CDO that issued Hildene's downstream and subordinated notes owns [redacted]

Redacted

19. On August 7, 2015, U.S. Bank purported to assign the claims brought in this action to Hildene. ECF No. 58-1. James Byrne – the U.S. Bank Vice President located in Boston – executed the Assignment on behalf of U.S. Bank. *Id.*

20. Hildene first asserted claims against Arvest Bank as the purported assignee of U.S. Bank on August 7, 2015, the same day the purported assignment occurred. ECF No. 58.

21. Hildene alleges in the Second Amended Complaint (the "SAC") that it is seeking to recover "economic losses" allegedly incurred by U.S. Bank: "As a result of Arvest's actions as set forth above, U.S. Bank sustained substantial economic losses in the form of loss of payments of principal and interest under the TruPS." ECF No. 58 at ¶ 68.

LAW AND ARGUMENT

I. U.S. Bank's claims are barred by Massachusetts' three year statute of limitations.

Pursuant to Federal Rule of Civil Procedure 56, a moving party is entitled to summary judgment where "there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law." *Pete v. Walgreen Co.*, 2016 U.S. Dist. LEXIS 110466, at *6-7 (W.D. Mo. Aug. 19, 2016) (Smith., J.); *see also Morris v. Northland Grp., Inc.*, 2016 U.S. Dist. LEXIS 82215, at *2-3 (W.D. Mo. June 24, 2016) (Smith, J.) (granting summary judgment where claims were undisputedly time-barred by the applicable statute of limitations).

The only claim asserted by Hildene against Arvest Bank is for tortious interference with contract. Hildene purports to bring this claim as the assignee of U.S. Bank. It is black letter law that "an assignee stands in the shoes of the assignor," and that all defenses against an assignor – including a statute of limitations defense – are also valid against the assignee. *Doss v. Epic Healthcare Management Co.,* 901 S.W.2d 216, 222 (Ct. App. Mo. 1995) ("A defense valid

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against the latter is also effective against the former."); *Hemar Ins. Corp. of Am. v. Ryerson*, 108 S.W.3d 90, 95 (Mo. Ct. App. 2003) ("Thus, upon assignment, Assignee obtained the same rights lender had and was subject to the same statute of limitations as lender."); *Stewart Title Guar. Co. v. Insp. & Valuation Int'l, Inc.*, 2013 U.S. Dist. LEXIS 146571, at *11 n.5 (N.D. Ill. Oct. 10, 2013).

A. Under Missouri's borrowing statute, a cause of action in a case involving purely economic injuries originates where the plaintiff ascertains damages.

As this Court held in its Order granting in part, denying in part and deferring in part Defendants' Motion to Dismiss (the "Dismissal Order") (ECF No. 78), "a federal court sitting in diversity applies the statute-of-limitations rules of the forum." Dismissal Order at p. 4; *see also Myers v. Life Ins. Co. of N. Am.*, 2005 U.S. Dist. LEXIS 36324, at *4-5 (E.D. Mo. Dec. 28, 2005). Missouri law includes a borrowing statute, which states:

> Whenever a cause of action has been fully barred by the laws of the state . . . in which it originated, said bar shall be a complete defense to any action thereon, brought in any of the courts of this state.

Mo. R.S. § 516.190. This Court recognized in the Dismissal Order that "Missouri's borrowing statute bars an action if (1) the action originated in another state and (2) the other state's statute of limitations bars the action." Dismissal Order at p. 4; *Myers*, 2005 U.S. Dist. LEXIS 36324, at *5. Thus, "the critical issue in applying [the borrowing] statute is determining ***where a cause of action originated***." *Great Plains*, 492 F. 3d at 992 (emphasis added) (internal citations omitted).

In answering the question of *where* a cause of action originates for purposes of the Missouri borrowing statute, the Eighth Circuit has made clear that a cause of action for purely economic damages accrues where the plaintiff ascertains damages, which is where the plaintiff is located and "is financially damaged." *Great Plains*, 492 F. 3d at 993. *Great Plains* is directly on-point and controlling here. There, the plaintiff Great Plains Trust Company held $500,000 in debentures. The defendant, Union Pacific, failed to make a payment due under the debentures, and Great Plains sued Union Pacific in Missouri federal court. The district court dismissed Great Plains' suit on statute of limitations grounds, and the Eighth Circuit affirmed. The Eighth Circuit began by noting that under Missouri's borrowing statute, "a cause of action accrues *where* damages are capable of ascertainment." *Id.* at 993 (emphasis in original). The Eighth Circuit then went on to hold:

> For cases involving a purely economic injury, as opposed to a physical accident with economic consequences, a cause of action originates where the plaintiff is financially damaged . . . This case involves a purely economic injury that Great Plains could only have ascertained at its place of business in Kansas. Therefore, the Kansas statute of limitations applies . . . .

Id. at 993; *see also Beyond Batten Disease Found. v. Children's Mercy Hosp.*, 2016 U.S. Dist. LEXIS 98568, at *7 (W.D. Mo. July 28, 2016) ("Since BBDF sustained purely economic injury, the Court will focus on where plaintiff was financially damaged. BBDF is located in Texas . . . Therefore, Texas is where BBDF's financial damage will occur."); *Master Mortgage Inv. Fund v. American Nat'l Fire Ins. Co.*, 151 B.R. 513, 517 (Bankr. W.D. Mo. 1993) (holding that "cause of action accrues at the place where payment was to be made" to plaintiff).

Here, as plainly alleged in the SAC, U.S. Bank's claim against Arvest Bank is for purely economic injury in connection with Bannister's failure to pay U.S. Bank money owed under the Debentures:. "As a result of Arvest Bank's actions as set forth above, U.S. Bank sustained substantial economic losses in the form of loss of payments of principal and interest. . . . ." SAC at ¶ 68. Thus, this Court should apply the statute of limitations of the jurisdiction where U.S. Bank, as trustee, would have ascertained its damages – and that jurisdiction is clearly Massachusetts. The Debentures have been held by and registered to U.S. Bank at One Federal Street, Boston, MA. *Supra* at ¶¶ 8-9. The U.S. Bank executives overseeing the Indenture have been continuously based in Boston, MA. *Supra* at ¶¶ 12-13. The Debentures require Bannister to make principal and interest payments directly to U.S. Bank and wired to US BANK NA BOSTON. *Supra* at ¶ 11. And communications and billing statements were regularly issued to Bannister by U.S. Bank from its Boston office. *Supra* at ¶¶ 14-15 Massachusetts is thus clearly the jurisdiction where U.S. Bank was capable of ascertaining its financial damages in this case.

B. Massachusetts' three year statute of limitations bars U.S. Bank's claim.

Under Massachusetts law, all tort claims are governed by a three year statute of limitations. *See* Mass. General Laws Ch. 260, § 4; *Stark v. Advanced Magnetics, Inc.*, 736 N.E.2d 434, 441 (Mass. App. Ct. 2000) ("Actions for tortious interference with contractual or advantageous relations . . . must be brought within three years after the cause of action accrues."). The Massachusetts statute of limitations "starts to run when an event or events have occurred that were reasonably likely to put the plaintiff on notice that someone may have caused her injury." *Shay,* 702 F.3d at 80. The plaintiff "need not know the full extent of his injury" in order for the three year statute of limitations to begin to run on a tortious interference with contract claim. *Stark*, 736 N.E.2d at 442. Rather, "[a]ll that is necessary is that an event or events have occurred that are reasonably likely to put the plaintiff on notice that he has been harmed." *Id.; see also Randal v. Boston Hous. Auth.*, 2007 U.S. Dist. LEXIS 78219, at *10 (D. Mass. Sept. 19, 2007).

Here, the three year statute of limitations on U.S. Bank's claim for tortious interference with contract began to run no later than June 22, 2012 – the date the Union Bank Transaction closed.[5] There can be no doubt that the closing of the Union Bank Transaction put U.S. Bank on

[5] Although not necessarily relevant to the statute of limitations analysis, counsel for Hildene wrote to Bannister on April 6, 2012, and argued that "the proposed transaction with Arvest Bank in its current form constitutes a violation of Section 3.7 of the Indenture." Ex. O at p. 3. Thus, like U.S. Bank, Hildene was aware of the Union Bank Transaction (and had taken the position that the Transaction would breach the Indenture) well before it closed in June 2012.

notice that Arvest Bank "may have caused [it] harm" by purportedly interfering with Bannister's ability to pay U.S. Bank the principal and interest owed under the Indenture, as evidenced by U.S. Bank's July 16, 2012 letter to Bannister in which it declared that the Union Bank Transaction constituted a breach of the Indenture. *Supra* at ¶ 5. Moreover, in the Second Amended Complaint, Hildene (assignee of U.S. Bank) alleges that the triggering breach occurred in June 2012. *See* SAC at ¶ 27 ("Arvest procured and/or induced the breach of the Indenture when it acquired Union Bank's assets and certain liabilities ***in or around June 2012***.") (emphasis added). Thus, the statute of limitations on U.S. Bank's claim began to run on June 22, 2012, and had expired by June 22, 2015.

U.S. Bank never brought a claim in its own name against Arvest Bank in connection with the Union Bank Transaction, and did not attempt to assign its claim to Hildene until August 7, 2015. That same day, Hildene first brought claims as the purported assignee of U.S. Bank. *See* ECF No. 58.[6] But because the statute of limitations on U.S. Bank's claim had run by June 22, 2015, the claim brought by Hildene on behalf of U.S. Bank on August 7, 2015, is time-barred, and summary judgment should be granted for Arvest Bank.[7]

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[6] This Court already has held, as a matter of law, that Hildene's Second Amended Complaint (in which it first purported to assert claims as the assignee of U.S. Bank) does not relate back to the filing dates of any earlier complaints. *See* ECF No. 78 at n. 4 ("While the Court is not determining which state's statute of limitations is applicable to Plaintiff's tortious interference claim . . . the Court notes Plaintiff's Second Amended Complaint does not relate back to its original Complaint or its First Amended Complaint."). Thus, the applicable filing date for statute of limitations purposes is August 7, 2015.

[7] The Indenture required U.S. Bank to maintain an office in Connecticut where payments on the Debentures could be made. In *Great Plains*, the Eighth Circuit held that a physical office like this did not constitute the place of payment, because there was no evidence that the plaintiff had ever exercised its right to be paid there. 492 F.3d at 992-93. Here, however, the issue is moot, because the application of Connecticut law also would render U.S. Bank's claim untimely. Like Massachusetts, Connecticut applies a three year statute of limitations to all tort claims. *See* Connecticut General Statutes §52-577 ("No action founded upon a tort shall be brought but

C. **Hildene's arguments for application of Missouri's statute of limitations all fail.**

Hildene, in its motion for partial summary judgment, makes several arguments for the application of Missouri's statute of limitations. These arguments all fail.

First, Hildene strangely and incorrectly argues that a claim for tortious interference with contract involving purely economic damage originates under Missouri's borrowing statute "where the tortious act occurred," and under this standard Missouri's statute of limitation should apply. ECF No. 114 at p. 9. This is an argument that was rejected by this Court in the Dismissal Order and has been rejected by other courts in this District as well. *See* Dismissal Order at 5 (rejecting argument that "a tort generally accrues where the wrongful conduct occurs"); *see also Morley v. Square, Inc.*, 2014 U.S. Dist. LEXIS 147476 (E.D. Mo. Oct. 16, 2014) (in economic injury case, rejecting argument that "damages are incurred at the place where the complained-of act occurred"); *Master Mortgage Inv. Fund.*, 151 B.R. at 516 ("In tort cases, it is clear that it is irrelevant where the act causing the injury occurred."). Hildene relies on cases involving non-economic damages to argue that its claim originates where the wrongful conduct occurred. *See* ECF No. 114 at pp. 9-10. But this case involves purely economic damages and thus is on all fours with *Great Plains* (which, like this case, also involved a failure to pay money owed pursuant to debentures). Accordingly, *Great Plains* controls and requires this Court to apply the statute of limitations of the jurisdiction where U.S. Bank was located and financially damaged.[8]

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within three years from the date of the act or omission complained of."); *Dauphinias v. Cunningham*, 395 Fed. Appx. 745, 746 (2d Cir. 2010); *Pmg Land Assocs. v. Landing*, 2015 Conn. Super. LEXIS 1300, at *8 (Sup. Ct. Conn. April 24, 2015).

[8] Even if this Court were to apply the statute of limitations of the jurisdiction where the tortious conduct occurred, as Hildene urges, that jurisdiction would not be Missouri but would be Arkansas – which also has a three year statute of limitations that would have begun to run on the date the Union Bank Transaction closed. *See, e.g., Shelnutt v. Laird*, 359 Ark. 516 (Ark. 2004); *Mt. Home Flight Serv. v. Baxter County*, 2012 U.S. Dist. LEXIS 84471, at *14-15 (W.D. Ark.

Second, Hildene incorrectly argues that "it simply does not make sense to enforce the statute of limitations of [] U.S. Bank's principal place of business" because the downstream CDO noteholders (like Hildene) are located in "various jurisdictions." But the location of the downstream CDO noteholders is entirely irrelevant to the statute of limitations analysis. In this case, Hildene is not bringing claims on behalf of these downstream CDO noteholders; rather, Hildene is bringing this claim solely and entirely as the purported assignee of U.S. Bank in an effort to recover monies owed to U.S. Bank. *See* SAC at ¶ 68 ("U.S. Bank sustained substantial economic losses in the form of loss of payments of principal and interest . . . ."). The economic injuries at issue are those allegedly suffered by U.S. Bank as a result of Bannister's alleged breach of the Indenture; the economic injuries at issue are not the piecemeal damages of the multitude of downstream CDO investors who may be located in "various jurisdictions" and who may ultimately be owed money pursuant to CDO agreements or other arrangements.

Third, Hildene incorrectly argues that, even if a three year statute of limitations applies, the statute would not have begun to run until 2014, which is when "noteholders would have necessarily begun to receive payments (but did not) following Bannister's five-year deferral period." Courts in Missouri and Massachusetts, however, have made clear that the statute of limitations in economic damages cases is triggered by the underlying wrongful act, and not by the future realization of damages caused by that act. *See, e.g., Shay*, 702 F.3d at 80 (statute begins to run "when an event or events have occurred that were reasonably likely to put the

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June 19, 2012) (cause of action for tortious interference with contract accrues when the allegedly improper conduct "either induce[d] or otherwise cause[d] a third person not to perform a contract . . . ."). Hildene argues with no supporting evidence that Arvest Bank's conduct occurred principally in Missouri, but this is not so: Arvest Bank is headquartered in Arkansas (from where Arvest Bank negotiated and entered into the Union Bank Transaction) and is where Arvest Bank allegedly made "misrepresentations" to the Arkansas State Bank Department in connection with the Union Bank Transaction. *See* ECF No. 58 at ¶ 28. Thus, even applying the incorrect legal standard advocated by Hildene, U.S. Bank's claims still would be time-barred.

plaintiff on notice that someone may have caused her injury."); *see also Beyond Batten*, 2016 U.S. Dist. LEXIS 98568, at *14 (applying Texas law and holding that, where injuries could be traced to "one wrongful act," the statute began to run when that wrongful act occurred). Here, any damages U.S. Bank may be entitled to recover from Arvest Bank stem directly from the closing of the Union Bank Transaction in June 2012, as is alleged in the Second Amended Complaint to have constituted a breach of the Indenture. *See* SAC at ¶ 27 ("Arvest procured and/or induced the breach of the Indenture when it acquired Union Bank's assets and certain liabilities in or around June 2012."). Thus, with respect to Arvest Bank, the statute did not sit idle until 2014; it began to run when the Union Bank Transaction closed, which should have (and did) put U.S. Bank on notice "that someone may have caused [it] injury." *Shay*, 702 F.3d at 80.

Fourth, and finally, Hildene incorrectly argues that Missouri's statute of limitations should apply because Arvest Bank previously argued in favor of transferring this case to Missouri. This argument is a non-starter: The standards for transfer (the convenience of the witnesses and the parties, and the administration of justice) are clearly different than the standard under *Great Plains* for determining the applicable statute of limitations (where did the plaintiff ascertain damages?). Simply because it is more convenient to litigate this action in Missouri than in the original Connecticut forum does not mean that Missouri's statute of limitations should somehow apply. Moreover, when it brought claims in Connecticut, Hildene was purporting to act as the "agent for The Bank of New York Mellon," not as the assignee of U.S. Bank, and thus any arguments it makes regarding transfer are of little value now.

CONCLUSION

U.S. Bank had three years to bring a claim against Arvest Bank for allegedly tortiously interfering with the Indenture, but never did. Now Hildene – the hedge fund whose business model revolves around purchasing debt on the cheap and then bringing litigation against "beaten down" banks and financial institutions – seeks to extract some money from Arvest Bank for its role in saving Union Bank from total collapse. But Hildene is too late: Under *Great Plains* and other clear precedent, U.S. Bank's claim was time-barred by June 22, 2015, and summary judgment should accordingly be granted in favor of Arvest Bank.

Respectfully submitted,

Dated: September 8, 2016

/s/ Michael S. Cargnel

SHOOK, HARDY & BACON L.L.P.
Michael S. Cargnel
mcargnel@shb.com
Jenna Sheldon-Sherman
jsherman@shb.com
2555 Grand Boulevard
Kansas City, MO 64108
Tel: (816) 474-6550
Fax: (816) 421-5547

SQUIRE PATTON BOGGS (US) LLP
Joseph C. Weinstein (admitted *pro hac vice*)
joe.weinstein@squirepb.com
Sean L. McGrane (admitted *pro hac vice*)
sean.mcgrane@squirepb.com
4900 Key Tower, 127 Public Square
Cleveland, OH 44114
Tel: (216) 479-8500
Fax: (216) 479-8780

Attorneys for Defendant Arvest Bank

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on all counsel of record through this Court' s Electronic Case Filing system, this 8th day of September, 2016.

/s/ Michael S. Cargnel

APPENDIX I: RESPONSE TO HILDENE'S "STATEMENT OF UNCONTROVERTED MATERIAL FACTS AND PROCEDURAL HISTORY"

The below numbering corresponds to the "Statement of Uncontroverted Material Facts and Procedural History" included in Hildene's suggestions (ECF No. 114) at pages 2-6.

1. Disputed. Arvest Bank admits that Bannister issued approximately $20 million in Debentures pursuant to the terms of the December 17, 2003 Indenture. The evidence cited by Hildene, however, does not support the statement that the Debentures were issued "to fund [Bannister's] operating subsidiary, Union Bank."

2. Disputed. The capital securities were issued pursuant to a separately-executed Declaration of Trust, which established the Bannister Statutory Trust. ECF No. 114-2.

3. Disputed. Documents produced by U.S. Bank show that U.S. Bank is the registered holder of the Debentures. Exs. H & I.

4. No dispute.

5. No dispute.

6. No dispute.

7. No dispute – and, as Hildene acknowledges, Section 3.7 of the Indenture applied only to property belonging to Bannister and does not place any restrictions on the sale or transfer of assets owned by any of Bannister's subsidiaries (like Union Bank).

8. No dispute.

9. Disputed. The PRETSL XII CDO which issued the downstream and subordinated notes owned by Hildene owns [redacted] Redacted

10. No dispute.

11. Disputed. This statement plainly mischaracterizes the Union Bank Transaction. The cited evidence is a press release issued by Arvest Bank on January 30, 2012, regarding the Union Bank Transaction. The press release does not state that the Union Bank Transaction left "Bannister holding the stock of an empty shell." Arvest Bank disputes this characterization and notes that Hildene has failed to provide any competent evidence in support of this characterization. Arvest Bank also disputes the statement that it acquired "all of Union Bank's" assets in the Union Bank Transaction; it acquired substantially all (but not all) of Union Bank's assets. Even the evidence cited by Hildene states that Arvest Bank acquired "substantially all" of

Union Bank's assets. Arvest Bank does not dispute that it acquired certain Union Bank branches in the Kansas City metropolitan area as part of the Union Bank Transaction, and does not dispute that the Union Bank Transaction solidified Arvest Bank's presence on the Missouri side of Kansas City.

12. Disputed. This statement mischaracterizes the requirements of the Indenture's successor obligor provision. The successor obligor provision prohibits ***Bannister*** from selling substantially all of ***Bannister's*** property unless the acquirer assumes ***Bannister's*** responsibilities under the Debenture. *See* Ex. D at § 3.7. In the Union Bank Transaction, Arvest Bank acquired substantially all of the assets of ***Union Bank*** (not Bannister) and assumed certain liabilities of ***Union Bank*** (not Bannister). Thus, the successor obligor provision is not implicated by the Union Bank Transaction.

13. No dispute: U.S. Bank declared Bannister to be in default of the Indenture on July 16, 2012.

14. No dispute.

15. Disputed. Arvest Bank admits that Hildene is only a "small" holder of the notes issued by the PRETSL XII CDO, but disputes the remaining portions of the statement and states that additional discovery would be necessary to determine the truth of this statement.

16. Disputed. Additional discovery would be necessary to determine the truth of this statement.

17. Disputed. Arvest Bank admits that Hildene brought suit against Arvest Bank in Connecticut in September but disputes the characterization of that suit as "timely," which is a legal conclusion, and Hildene was not the real party in interest in any event.

18. No dispute, although Arvest Bank notes that the Hildene was not asserting claims on behalf of U.S. Bank when it commenced the Connecticut action, and instead was purporting to act as the "agent for the Bank of New York Mellon."

19. No dispute.

20. No dispute.

21. Disputed. Arvest Bank does not dispute that Hildene voluntarily dismissed the Connecticut action, but no competent evidence is cited for the proposition that the dismissal was filed "to get beyond procedural issues." Nor is any evidence cited for the proposition that "there could be no question that the conduct at issue occurred" in Missouri; Arvest Bank does not dispute that some of the conduct underlying the Union Bank Transaction occurred in Missouri, but states that the majority of the allegedly "wrongful" conduct by Arvest Bank occurred in Arkansas. *See, e.g.,* ECF No. 58 at ¶ 28.

22. Disputed. Arvest Bank does not dispute that some of the conduct underlying the Union Bank Transaction occurred in Missouri, but states that the majority of the allegedly "wrongful" conduct by Arvest Bank occurred in Arkansas. *Id.*

23. Disputed. Arvest Bank disputes this statement to the extent it seeks to characterize this Court's July 16, 2015 order, and states that the order speaks for itself.

24. Disputed. Arvest Bank does not dispute that U.S. Bank and Hildene purported to execute an assignment agreement dated August 7, 2015, but disputes that this assignment agreement is valid. *See supra* at n.4.

25. No dispute.

26. Disputed. Arvest Bank disputes Hildene's characterization of Arvest Bank's argument in its Motion to Dismiss and states that the motion speaks for itself.

27. No dispute.